

BEFORE THE SHORELINES HEAPINGS BOARD
STATE OF WASHINGTON

GARY A. BANDY,

Appellant,

v.

JEFFERSON COUNTY and STATE OF
WASHINGTON, DEPARTMENT OF
ECOLOGY,

Respondent.

SHB No. 89-8

ORDER OF
DISMISSAL

Order No. DE 88-367, dated January 23, 1989, was issued jointly by Jefferson County and the Washington State Department of Ecology to Gary Bandy. The order alleged that Bandy had undertaken shorelines development inconsistent with the Jefferson-Port Townsend Shoreline Management Master Program and the Shoreline Management Act of 1971. Bandy was directed to take specified corrective action.

On February 17, 1989, Bandy, through counsel, filed a Request for Review, (with exhibits attached) asking this Board to review the

1 the issuance of Order No. DE 88-367 and the refusal of Jefferson
2 County to grant him an exemption from shorelines permit requirements.

3 On March 9, 1989, the Department of Ecology filed a Motion to
4 Dismiss asserting that the Board is without authority to entertain
5 Bandy's appeal.

6 On March 13, 1989, Bandy filed an Amended Request for Review,
7 enclosing a letter from Jefferson County dated February 28, 1989,
8 denying Bandy's request for an exemption from the requirement for a
9 shoreline substantial development permit. On March 20, 1989, Bandy
10 filed a Reply to Motion to Dismiss.

11 Based on the files and records herein, the Board enters the
12 following:

13 I

14 The Board in earlier cases determined that it is without
15 authority to hear appeals of regulatory orders issued in connection
16 with the Shoreline Management Act, chapter 90.58 RCW. Cordes v.
17 Department of Ecology, SHB No. 78-47 (1979), Nelson v. Department of
18 Ecology, SHB No. 79-11 (1979). The basis for this conclusion was that
19 the jurisdiction of the Board, as defined by statute, was limited to
20 review of the "granting, denying or rescinding" of permits. RCW
21 90.58.180.

22 These prior decisions predated the enactment of Section 4,
23 chapter 292, Laws of 1986. By that enactment the Legislature amended
24

1 RCW 90.58.210 explicitly empowering local governments and the
2 Department of Ecology to impose civil penalties upon
3 any person who shall fail to conform to the terms of a
4 permit issued under this chapter or who shall undertake
5 development on the shorelines of the state without
6 first obtaining a permit required under this chapter.

7 The amendment provided that penalties imposed by Ecology alone or
8 imposed jointly by Ecology and local government are subject to review
9 by the Shorelines Hearings Board. In addition, the amendment called
10 for the notice of penalty to include a cease and desist order "or, in
11 appropriate cases" to require necessary corrective action to be taken.

12 The express expansion of this Board's jurisdiction created by the
13 amendment to RCW 90.58.210 is limited to those instances in which a
14 penalty is assessed. In such cases we believe the Board would, by
15 necessary implication, have the authority to review the terms of any
16 regulatory order specifying "necessary corrective action."

17 In the instant case, however, no penalty was imposed. A
18 regulatory order alone was issued. We find no grant of power in the
19 statute giving the Board review authority over such orders issued by
20 themselves.

21 II

22 In 1987, the Department of Ecology adopted regulations governing
23 shorelines enforcement and implementing the Legislature's amendment to
24 RCW 90.58.210. These regulations, contained in chapter 173-17 WAC,

1 address the issuance of both regulatory orders and of civil
2 penalties. WAC 173-17-040, WAC 173-17-050. Only in the case of civil
3 penalties do the regulations provide for appeal to the Shorelines
4 Hearings Board. WAC 173-17-060. We regard this as expressing
5 Ecology's interpretation that the Legislature did not extend review
6 authority to the Board over regulatory orders issued without an
7 accompanying penalty.

8 The contemporaneous interpretation of legislation by an agency
9 charged with its implementation is entitled to deference.

10 Weyerhaeuser Company v. Department of Ecology, 86 Wn.2d 310, 545 P.2d
11 5 (1976).

12 III

13 We conclude that the Board's authority to review regulatory
14 orders is restricted to those instances in which a civil penalty is
15 assessed. Accordingly, we hold that we lack jurisdiction to review
16 Order No. DE 88-367 as a regulatory order.

17 IV

18 Appellant argues that Order No. DE 88-367 is, in effect, the
19 denial of a permit exemption request, confirmed formally by the
20 County's letter of February 28, 1989. We are asked to review the
21 permit exemption decision. Again, we perceive a difficulty with our
22 jurisdiction.

1 A permit exemption decision is neither the "granting, denying or
2 rescinding" of a permit (RCW 90.58.180), nor the issuance of a civil
3 penalty (RCW 90.58.210). It is, therefore, not within the explicit
4 review authority granted to this Board by the Legislature. This lack
5 of explicit authority has led appellate courts to conclude that the
6 Shorelines Hearings Board cannot directly review exemption decisions.
7 Putnam v. Carroll, 12 Wn.App. 201, 534 P.2d 132 (1975) (exemption
8 denied locally); Toandos Peninsula Association v. Jefferson County, 32
9 Wn.App. 473, 648 P.2d 448 (1982) (exemption granted locally).

10 Under the case law the only way an exemption question can be
11 entertained by the Board is in connection with a permit decision. If
12 a permit has been granted, denied or rescinded, then a party on appeal
13 to the Board may raise exemption questions in connection with whether
14 the permit application was properly ruled upon. See, Putnam. Here,
15 the record discloses only that a permit exemption was sought. It does
16 not show that a shoreline permit was ever even applied for.

17 V

18 We hold that the Board is without authority to review Order No.
19 DE 88-367 as an exemption decision and, likewise, without authority to
20 review the decision announced in the County's letter of February 28,
21 1989.

VI

While we express no opinion as to whether the development work undertaken by Mr. Bandy is exempt from shoreline permit requirements, we note that the County asserts the dredging and filling involved are prohibited activities under its Shoreline Management Master Program. Even if exempt from permit, the development could not lawfully involve activities prohibited by the substantive provisions of the Act or implementing master program. See Putnam, supra; Hunt v. Anderson, 30 Wn.App. 437, 635 P.2d 156 (1981).

ORDER

The Department of Ecology's Motion is granted. The appeal is hereby dismissed.

DONE this 5th day of May, 1989.

SHORELINES HEARINGS BOARD

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